No. 84-261

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION,

*Petitioner,*

v.

GARY WEINTRAUB, et al.,

*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DAVID A. EPSTEIN

*Attorney for Respondents,*
*Frank H. McGhee*
*and Andrew McGhee*

JANN, CARROLL, SAIN & DOLIN, LTD.
55 East Monroe Street, Suite 4444
Chicago, Illinois 60603
(312) 236-3600

## QUESTIONS PRESENTED

1. Whether a trustee in bankruptcy has the power to assert or waive the bankrupt's attorney-client privilege, with respect to privileged communications antedating the filing of the bankruptcy petition?

2. If so as a general matter, whether a trustee of a corporation in bankruptcy may waive the corporation's attorney-client privilege, with respect to privileged pre-bankruptcy communications, despite the opposition of a stockholder and of the sole director, and despite the corporation's representation by separate counsel approved by the bankruptcy court?

3. If so as a general matter, whether a trustee in bankruptcy may, consistent with his fiduciary obligations, waive his bankrupt's attorney-client privilege, with respect to privileged pre-bankruptcy communications: (i) for the purpose of facilitating a government investigation, (ii) where the government is adverse to the bankrupt and is empowered to seek sanctions, including financial penalties, against the bankrupt, and (iii) blindly, without consideration of the potential impact of disclosure on the bankrupt estate (because, *inter alia*, the trustee is unaware of the contents of the privileged communications to the bankrupt's former attorney which are sought to be disclosed)?

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## STATEMENT OF THE CASE

This is a proceeding to enforce an administrative subpoena of the Commodity Futures Trading Commission (the "CFTC") with respect to twenty-three questions to which Gary A. Weintraub, an attorney, asserted the attorney-client privilege of his former client and Canon 4, Rule 4-101, of the Illinois Code of Professional Responsibility (79 Ill.2d XXV, XLIV-XLV (1980)).

Mr. Weintraub responded to the subpoena and appeared before CFTC representatives on three days (February 26 and 27, and August 26, 1981). He answered approximately 800 questions. After he testified in the CFTC's investigation of his former client, Chicago Discount Commodity Brokers, Inc. ("CDCB"), the CFTC brought this action to compel Weintraub to answer the disputed questions. Then, as now, CDCB was in bankruptcy.

On March 5, 1982, six months after Mr. Weintraub's last examination, the CFTC requested CDCB's trustee in bankruptcy, John K. Notz, Jr.,* to waive CDCB's attorney-client privilege. On March 11, the trustee responded to the CFTC:

> As Interim Trustee [for CDCB] I hereby waive any interest I have in the attorney-client privilege possessed by that debtor for any communications or information occurring or arising on or before October 27, 1980.
>
> (Docket Item #18; Appendix A, *post*, 1a)

Other than the trustee's waiver letter (in which he acceded to the CFTC's request without limitation or condition, and without explanation), the record is silent as to any reasons for the trustee's waiver, or any "considerations" by him in granting the CFTC's request. (Despite improper and

* On the CFTC's recommendation, Mr. Notz had been appointed as equity receiver of CDCB. (*See*, Case No. 80 C 5755 (U.S.D.C., N.D.Ill.) (Moran, J.), transcript of proceedings, October 27, 1980, attached as Exhibit 1 to the "Provisional Motion of Intervenors for Leave to Supplement the Record" filed in, and granted by, the Seventh Circuit.) Mr. Notz then filed a voluntary petition in bankruptcy (Chapter 7) on behalf of CDCB, and was appointed interim trustee and eventually permanent trustee for CDCB by the bankruptcy court. The bankruptcy court also appointed independent counsel for CDCB as debtor. (Order of November 24, 1980, No. 80 B 14472 (U.S.Bankr.Ct., N.D.Ill.) (Fisher, B.J.).



self-serving efforts by the trustee after-the-fact and *dehors* the record to justify his blanket waiver, the only reason of record for the waiver was the CFTC's request.)*

The matter was argued before a magistrate (Carl B. Sussman), who held (i) that the disputed matters were privileged, and (ii) that Mr. Weintraub had properly asserted the attorney-client privilege, but (iii) nonetheless directed Weintraub to answer the disputed questions on the basis of the subsequent "waiver" by the bankruptcy trustee.

Mr. Weintraub, joined by Respondents Frank H. McGhee, the sole officer and director of the corporation, and Andrew McGhee, a stockholder of the corporation (intervening respondents below), filed objections in the district

* Neither at the time of the "waiver", nor when the trustee's letter was presented to the bankruptcy court, nor in the district court, was any showing made of any reason for the waiver, or that the trustee gave any consideration to the potential effects of the solicited disclosures. On appeal (on petition for rehearing), the CFTC was allowed to supplement the record: no showing of the trustee's reasons or "consideration" was even offered.

In his *amicus* brief to the Seventh Circuit, on rehearing, the trustee for the first time claimed (without even a supporting affidavit) that he had "decided that the best interests of the CDCB estate would be advanced by waiving the privilege" (Brief of John K. Notz, Jr., Trustee, as *Amicus Curiae*, in Support of the Petition of the [CFTC] for Rehearing, with Suggestion that Rehearing Be *En Banc*, at 1 (filed in the Seventh Circuit, February 13, 1984)). The Government now relies on this representation (Petition for Writ of Certiorari, at 3, n1).

The trustee's belated and conclusory representation is contradicted by the fact that he could not possibly evaluate the "interests of the estate" without knowing the contents of the privileged communications (which have never been disclosed to him). Moreover, since the "waiver" was blanket, the potential disclosure was not limited to the twenty-three questions here in issue, but encompassed all privileged matters since CDCB's founding.

court. The CFTC did not appeal from the magistrate's holdings that the privilege applied and had been properly asserted by Weintraub.

The district court (Nicholas J. Bua, J.) initially affirmed, and later clarified* that "Respondent [Weintraub] shall respond to the . . . questions . . . without asserting an attorney-client privilege on behalf of [CDCB]" (Petition for Writ of Certiorari, *App. C*, at 17a, *App. D*, at 17b.))

Respondents McGhee appealed the district court's orders to the Seventh Circuit. Mr. Weintraub did not appeal. The CFTC did not cross-appeal on the issues of the privilege itself or its assertion by Mr. Weintraub. The Seventh Circuit reversed, holding that the trustee could not waive his debtor's privilege under the circumstances presented. (The Court of Appeal's original, unpublished opinion is set out in the Petition for Writ of Certiorari, *App. A*, at 1a.)

The CFTC moved to supplement the record and, joined by several *amici*,** petitioned the Court of Appeals for rehearing and for rehearing *en banc*. The Respondents also requested leave to supplement the record.

The panel allowed the parties to supplement the record, modified its original opinion to reflect the altered record, but adhered to its conclusion and judgment. (The court's

* The magistrate had ordered Weintraub to "respond to the various questions . . . [of the CFTC] without asserting *an* attorney-client privilege" (Order of April 26, 1982; Record Item #25) (emphasis added).

** The Court of Appeals allowed *amicus curiae* briefs, in support of the CFTC's Petition for Rehearing with Suggestion for Rehearing *En Banc*, to be filed by John K. Notz, Jr., CDCB's trustee in bankruptcy, by the United States Trustee for the Northern District of Illinois, by the Department of Justice, and by the Securities and Exchange Commission.



order modifying its original opinion is set out in the Petition for Writ of Certiorari, *App. B*, at 12a-16a; the revised opinion is published at 722 F.2d 338.) Rehearing *en banc* was denied; none of the sitting judges of the Seventh Circuit requested a vote. (Order of April 18, 1984; *see*, Petition for Writ of Certiorari, *App. F*, at 21a-22a.)

The CFTC has now petitioned this Court for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

## SUMMARY OF RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents agree that this case presents an important issue: the sanctity of the attorney-client privilege. The question is whether the attorney-client privilege is contingent on the client's solvency, *i.e.*, whether the privilege is lost as the price of invoking the protection of the Federal bankruptcy laws (or as a penalty of involuntary bankruptcy). This is the threshold issue presented.*

However, if the Court were to reverse the Seventh Circuit and to conclude that bankruptcy results in the devolution, by operation of law, of the client's privilege to his trustee in bankruptcy, then a second set of issues would be reached. These questions concern the propriety of a trustee's waiver of his debtor's attorney-client privilege

* There is no issue whether the privilege applies or was properly asserted in this case. The CFTC did not appeal from express findings below which held both. Those issues are not before the Court.

(as to pre-bankruptcy confidences) in light of his fiduciary obligations. The blind, blanket "waiver" in favor of a government investigation of the debtor in this case presents these concerns in sharp relief, and also threatens disclosure of confidences from years prior to bankruptcy.

The issue of disclosure of attorney-client confidences to outsiders is also far broader than the question of the trustee's own power to pierce his bankrupt's privilege (which is not itself presented here, but is encompassed within the waiver mechanism that is in issue).

These issues are compounded by another question which, while not directly presented in this case, inheres in the principle advocated by the Government. That principle is that the bankrupt's privilege passes to the trustee by operation of the Bankruptcy Code. If that interpretation of the Code were somehow adopted, the resulting bankruptcy rule would not be unique to the attorney-client privilege: it would apply to all of the evidentiary privileges of bankrupts.

A more immediate, but equally sensitive, aspect of this case is the application of the Government's trustee waiver power to individuals as well as to corporations. There is simply no basis in the bankruptcy laws to distinguish between individual and corporate bankrupts. This is virtually conceded by the Government in this Court, although a proposed distinction to this effect was advocated by the CFTC in the Court of Appeals.

In this Court, as below, the Government finds no legislative authority for either transferring the debtor's privilege(s) to his trustee in bankruptcy, or for permitting a trustee "waiver" of such pre-bankruptcy privilege(s), or for allowing the trustee himself to pierce the attorney-client privilege. Whatever else may be said, nothing in



either Congressional enactments or Congressional intent supports the Government's position or provides a basis for the fundamental change in the law which the Government's petition requests this Court to adopt.

The thrust of the Government's position is to attack the attorney-client privilege itself. The arguments advanced, which are hardly novel, distill down to the view that in extreme cases, the justification for disclosure is especially strong. The Government focuses its attack on the corporate privilege and on extreme situations, while disregarding the impact of its anti-privilege rule on routine business insolvencies (including, *inter alia*, sole proprietorships, which implicate an individual's privileges indistinguishably from the "business").

This Court has decisively upheld the corporate attorney-client privilege, and has affirmed the time-honored policies which underlie it. *Upjohn v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 585 (1981). This is not the case in which to reconsider *Upjohn*, or to create an exception in bankruptcy.

If privilege in bankruptcy is to be passed about, or treated differently for people and corporations (or for different privileges), or if limited exceptions are to be made in particular or extreme circumstances, or if special procedures are to be designed when conflicting interests are presented, then it is the Congress and not the Court which ought to create those distinctions and design those procedures.

Despite all of the reexamination and revision of the bankruptcy system by the legislative branch in recent years, the Congress has not done so. It has not authorized the judiciary to do so. The Government's petition is addressed to the wrong forum.

## RESPONSE TO THE GOVERNMENT'S REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

### 1. The Bankruptcy Code.

The Government rests its position as to the power of a trustee to waive his bankrupt's pre-bankruptcy attorney-client privilege upon "the powers accorded a Chapter 7 trustee by the Bankruptcy Code . . ." (Petition for Writ of Certiorari, at 9). The Government then cites a list of Bankruptcy Code provisions which confer specific powers and duties upon trustees. (Petition for Writ of Certiorari, at 9-10.) None of those provisions mentions attorney-client privilege, or deals even peripherally with the subject. As the Seventh Circuit concluded below:

> Although the [Bankruptcy Reform] Act [of 1978] confers broad powers on the trustee, *nowhere* is the trustee given specific authority either to assert or waive a corporate debtor's attorney-client privilege.
>
> 722 F.2d at 342, n8 (emphasis added)

The Government would have the Court read such authority into the Bankruptcy Code. Yet when Congress has addressed the attorney-client privilege in the Code, it has unequivocally reasserted the sanctity of bankrupts' privileges, even as against the trustee in bankruptcy. (Bankruptcy Code, §542(e), 11 U.S.C. 542(e).)* The Government

* Section 542(e) authorizes courts to order debtors' attorneys (and accountants) to turn over "recorded information" to the trustee (only). That provision, however, contains an explicit limitation: "subject to any applicable privilege". The purpose of this statutory remedy was to deprive attorneys and accountants of the leverage

(Footnote continued on following page)



has misdirected its petition, which more appropriately should be addressed to the Congress.

### 2. Other Congressional Pronouncements.

The Government argues that a bankruptcy trustee is the "proper party to waive or assert the corporate debtors' attorney-client privilege" on the basis of a proposed Federal Rule of Evidence which has been *rejected* by Congress—although the Government does not mention the Congressional rejection (Petition for Writ of Certiorari, at 11, citing proposed Fed.R.Evid. 503(c), 56 F.R.D. 183, 236 (1972)). It is anomalous for the Government to rely on a congressionally-rejected change in the law as support for an interpretation of another congressional statute.

Congress has explicitly reserved to itself the power to approve evidentiary rule changes "creating, abolishing, or modifying a privilege" (28 U.S.C. 2076). The interpretation of the Bankruptcy Code sought by the Government in this case would accomplish indirectly what Congress has explicitly prohibited.

In any event, the Government's reliance on rejected Rule 503(c) is puzzling, since that proposed rule dealt only with the question of who may *claim* the privilege, and did not address the power to waive privilege.

* *continued*
they previously had under state lien laws to secure payment before other creditors (by withholding unprivileged documents) from the trustee. (*See*, House Rept. No. 95-595, 95th Cong., 1st Sess. 369-370 (1977); Senate Rept. No. 95-989, 95th Cong., 2d Sess. 84 (1978).)

**3. The Caselaw.**

The Government argues that the "decision below directly conflicts with the decision of the Eighth Circuit in *Citibank, N.A. v. Andros,*" 666 F.2d 1192 (8th Cir. 1981), and "also conflicts with the result in *In re O.P.M. Leasing Services, Inc.,*" 670 F.2d 383 (2d Cir. 1982). (Petition for Writ of Certiorari, at 5-7.)

In *Citibank*, the seminal decision among the federal circuits, the Eighth Circuit concluded:

> Because the right to decide whether to waive a corporation's attorney-client privilege belongs to management, the right to assert or waive that privilege *passes with the property* of the corporate debtor to the trustee.
>
> 666 F.2d at 1195 (emphasis added)

The *Citibank* panel could cite no specific provision of the [former] Bankruptcy Act of 1898 to support that conclusion.

In *O.P.M.*, decided a month later, the Second Circuit noted the *Citibank* decision (670 F.2d at 386, n2), but found it "unnecessary to accept" the "emphasis on property concepts" and instead narrowly held:

> We hold simply that, as codified in [New York statute], management of a corporation is a function vested in a board of directors, which function may be delegated only to corporate officers. Shareholders have no power to do anything except to elect the members of the board. We hold that in this situation the power to make such a decision as is encompassed by assertion or waiver of the important attorney-client privilege adheres to the trustee *by virtue of the nonexistence of any other entity authorized to so act.*
>
> 670 F.2d at 387 (emphasis added)



As the *Citibank* panel could find no support in the former Act, no specific provision of the Bankruptcy Code was cited in support of the *O.P.M.* panel's conclusion.

In the Ninth Circuit decision cited by the Government, *In re Boileau*, 736 F.2d 503 (9th Cir. 1984), the court followed *O.P.M.* and similarly limited its holding to the "distinctive" facts before it (*id.*, at 506). The issue was the authority of a court-appointed examiner to waive Mr. Boileau's attorney-client privilege. Noting the examiner's "expanded powers" by virtue of his appointment "by stipulation of the parties, to avoid . . . a trustee", the *Boileau* court emphasized:

> Our holding is not to be understood as a ruling on the authority of an examiner to waive the attorney-client privilege. We simply hold that under the particular facts of this case the waiver authority resided in the examiner. *cf. In re O.P.M. Leasing Services, Inc.* [citation omitted] (trustee had authority to waive privilege under peculiar facts of case).
>
> *Ibid.*

None of those decisions, it is submitted, made a thorough analysis of the bankruptcy statutes, or gave consideration to the impact on attorney-client privilege of a general trustee waiver power such as the Government seeks to validate in this case. Only *Citibank*, decided under the former Bankruptcy Act, even purports to be a ruling of general effect.

*Citibank* relied primarily on the general principle of the former Act that the trustee is vested with his bankrupt's title to property (*compare*, however, Bankruptcy Act of 1898, as amended, §110(a)(3), 11 U.S.C. §110(a)(3) (1976), *with* Bankruptcy Code of 1978, §323, 11 U.S.C. §323 (1984)). No circuit has held that the present Bankruptcy Code grants bankruptcy trustees general control of their debtors' privileges.

The Eighth Circuit's *Citibank* decision is of dubious authority under current bankruptcy law.* The two subsequent decisions (of the Second Circuit in *O.P.M.* and of the Ninth Circuit in *Boileau*) are both limited to their unique facts and do not conflict with the Seventh Circuit's holding in this case. The posture of the caselaw does not, therefore, present a conflict which requires the intervention of this Court at this time.

**4. The Government's abandonment of the individual-corporate distinction advanced below.**

The Government seemingly abandons the distinction between corporations and individuals which the CFTC advocated below:

> . . . the attorney-client privilege in the corporate context is different because a corporation is not an individual but "an artificial creature of law," *Upjohn v. United States*, 449 U.S. 389-390, and functions entirely differently from individuals.
>
> * * *
>
> The panel's concern in this regard overlooked *a significant difference between corporations and individuals* that vitiates any chilling effect . . . .
>
> Amended Petition of the [CFTC] for Rehearing with Suggestion that Rehearing Be *En Banc*, at 8 (filed with the Seventh Circuit) (emphasis added)

* To support its conclusion in *Citibank*, which relied principally on the property analysis under the former Act, the Eighth Circuit panel also resorted to rejected Federal Rule of Evidence 503(c) (666 F.2d at 1195), discussed *ante*, Point 2. That panel nonetheless recognized that when Congress addressed the subject of attorney-client privilege in the bankruptcy laws, its intent was not to alter the underlying "legal concepts that govern the attorney-client relationship." (*Ibid.*, discussing 11 U.S.C. 542(e); *see*, Point 1, *ante*.)



As to this suggested distinction, the Seventh Circuit noted:

> There is little authority to support the position that the *individual* debtor's attorney-client privilege passes to the trustee in bankruptcy.
>
> 722 F.2d at 342 (emphasis added)

and correctly concluded:

> We perceive no reason to afford a corporate debtor less protection than that afforded an individual debtor in bankruptcy.
>
> *Id.*, at 343

noting *In re Smith*, 24 B.R. 3 (Bankr. S.D. Fla. 1982), in which a trustee's waiver of a bankrupt *individual's* attorney-client privilege was allowed. The Government again cites *Smith* (Petition for Writ of Certiorari, at 6, n5), although it seemingly no longer urges the corporate-individual distinction advocated below by the CFTC, a distinction which does not derive from Congress and finds no support in the Bankruptcy Code.

The *Smith* result, in any event, is not unique. Other federal courts have also permitted third-party waivers of individuals' as well as corporations' privileges in bankruptcy. The Ninth Circuit did so in *Boileau, supra*, which involved a sole proprietor's bankruptcy; and at least one district court has done so (*In re Grand Jury Proceedings*, Grand Jury No. 84-21 (S.D. Cal., June 5, 1984) (unreported to date)).

This Court has upheld the applicability of the attorney-client privilege to corporations as well as to individuals. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 585 (1981). The occurrence of bankruptcy provides no basis for drawing a fundamental distinction between them.

**5. The Government's abandonment of the 7-11 distinction argued below (liquidation v. reorganization).**

The Government apparently renounces the other proposed distinction which the CFTC advocated below:

> The panel's distinction misapprehended the significant legal differences between a Chapter 11 corporate reorganization, as existed in *OPM Leasing*, and a Chapter 7 corporate liquidation as exists in this case.
>
> Amended Petition of the [CFTC] for Rehearing with Suggestion that Rehearing Be *En Banc*, at 3 (filed in the Seventh Circuit)

The Government now takes the position that:

> . . . when a trustee is appointed under Chapter 11, he should have the power to waive or assert the debtor corporation's attorney-client privilege for reasons analogous to those under Chapter 7.
>
> Petition for Writ of Certiorari, at 11, n12

To adhere to the 7-11 distinction advocated below would require the Government to concede that *In Re O.P.M. Leasing Services, Inc.*, 670 F.2d 383 (2d Cir. 1982), a *Chapter 11* case, was either (i) wrongly decided, or (ii) an isolated decision uniquely limited to its facts (non-existence of both boards of directors and officers).

**6. The Government's anti-privilege arguments.**

The Government's policy attack on the attorney-client privilege and its availability in this case renews the usual contentions that are always advanced by those seeking to erode privilege. The Seventh Circuit categorically rejected this attack:

> The assumption underlying the privilege is that "the benefits derived from encouraging communications outweigh the costs of keeping information from other parties." [citation omitted.]
>
> 722 F.2d at 340



This Court has also reaffirmed the underlying purpose of the attorney-client privilege. *E.g., Upjohn Co. v. United States, supra.* That purpose would be undermined, if not obliterated, if the Government's position were the law.

Conditioning the vitality of the privilege on the avoidance of (future) bankruptcy would chill attorney-client confidences. That is the predictable impact of the knowledge that confidential communications to an attorney could later be forcibly disclosed at the option of a trustee, whose primary loyalty lies to creditors (and who is effectively selected by those creditors, *see*, 11 U.S.C. §702).* Ironically, the chilling effect would be most acute when insolvency looms, a time when legal counsel is particularly important.

The Bankruptcy Code's uniform applicability to both individuals and corporations belies the Government's effort to minimize the impact of bankruptcy trustee waivers of attorney-client confidentiality. Moreover, it is difficult to perceive how the Government's proposed construction of the bankruptcy laws to devolve the bankrupt's privilege to the trustee would apply selectively to this one privilege: if adopted, the principle would apply to all of the debtor's privileges. The Government's request that this Court effect such a wide-reaching and fundamental change in the law, without Congressional sanction, disregards the proper role of the Court.

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* The Second Circuit, in *In re O.P.M. Leasing Services, supra,* noted the bankruptcy judge's observation in *Ross v. Popper*, 9 B.R. 485, 487 (S.D.N.Y. 1980) that bankruptcy trustees "frequently" side with creditors even when contrary to the bankrupt's interests. The Second Circuit panel recognized that the trustee's duties can "place him in conflict with the interests of the debtor". (670 F.2d at 386, n2.)

**7. The trustee's own examination powers.**

The Government notes that:

> The court of appeals' decision would presumably apply not only to investigations by government agencies, but also to the trustee's own examination of the debtor corporation's counsel.
>
> Petition for Writ of Certiorari, at 12, n15

This, however, has been the law for a hundred years. A trustee in bankruptcy has *no* authority to examine into privileged pre-petition matters of his bankrupt. *In Re O'Donohoe*, 18 Fed.Cas. 587 (Fed.Cas.No. 10,435) (D. Maine 1869); *In Re Krueger*, 14 Fed.Cas. 870 (Fed.Cas.No. 7,942), 2 Lowell 182 (D. Mass. 1872); *In Re Aspinwall*, 2 Fed.Cas. 64 (Fed.Cas.No. 591), 7 Ben. 433 (S.D. N.Y. 1874).

Congress has not altered the bankruptcy laws in this regard.* Significantly, neither the trustee's brief nor the Government's petition provides any authority for the proposition that trustees have the right to pierce the bankrupt's privileges.

The arguments advanced by the trustee in this case, John K. Notz, Jr., in his *amicus* brief to this Court are almost entirely aimed at the ability of bankruptcy trustees to gain access to privileged information of their debtors. He argues the desirability of this Court altering the law to provide such access and to allow him to pierce the privilege. In the historical context of the federal bankruptcy laws, such a basic change in the law should

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* As noted *ante* (Point 1), the only Congressional legislation directly addressing the privilege in the bankruptcy laws reasserted that the attorney-client privilege applies even as against the trustee. (11 U.S.C. §542(e)).



emanate, if at all, from the legislative branch. The need for such change, moreover, is at least inferentially disputed by the lack of litigation over the issue.

Most importantly, however, it must be emphasized that this issue is far narrower than the "waiver" issue presented by this case. Plainly, the trustee's ability to pierce the privilege is subsumed by the much broader waiver doctrine: the trustee can obtain privileged confidences if he can waive the privilege; yet if he waives, those confidences become available to others as well. But the question of the trustee's own access to privileged confidences implicates somewhat different policy considerations than those which apply to the general proposition of blanket disclosure of pre-bankruptcy confidences to the world at large and to the government specifically. The trustee's arguments are misdirected: this is not a case about the *trustee's* right to know; that issue is not presented or before this Court.

**8. The duties and loyalties of bankruptcy trustees.**

The Government's position disregards the reality that bankruptcy trustees owe their fiduciary duty to the creditors of the bankrupt, and only residuarily to the bankrupt. In corporate bankruptcies, the stockholders' interests (the ultimate corporate interest by any standard) are the trustee's lowest concern. Accordingly, trustees' decisions to assert or waive (their bankrupts') privilege would not be governed by the same considerations (nor would the same weight be accorded to them) as would the bankrupt's own decisions in the same circumstances.

The Government simply presumes that trustees would act in the best interests of the bankrupt: plainly an

untenable assumption.* The trustee's waiver in favor of the Government in this case, as in *In re Grand Jury Proceedings*, *supra*, and the trustee's waiver in favor of a creditor in *Citibank, N.A. v. Andros*, *supra*, are ample evidence, if any is needed. The trustee has appropriate responsibilities, but they can and in many instances will conflict with the bankrupt's interests.

Although privileged matters will occasionally arise in the course of trustees' pursuit of their statutory duties, in the garden-variety bankruptcy case privileged attorney-client communications will ordinarily encompass far broader matters and will involve confidences extending over far greater periods of time than the events pertaining directly to the bankruptcy.

The Government and the trustee understandably emphasize their professed concerns with privileged matters which may—speculatively—relate to illegal activities or to undisclosed assets or claims. That, it is respectfully submitted, is a distortion of the overall picture, and a misrepresentation of the larger issues implicated by this case.

The Government and the trustee argue that if the trustee does not succeed to the debtor's privilege(s), bankruptcy will be utilized as a device for insulating attorney-

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* As the magistrate and the district court observed in *Ross v. Popper*, 9 B.R. 485, 487 (S.D.N.Y. 1980):

> In that context [pre-bankruptcy attorney-client communications], it seems to me almost axiomatic that the beneficiary of such communications is *the bankrupt corporation itself*, whose interests are quite obviously adverse to the interests of the trustee in bankruptcy, representing the general creditors. It therefore seems to me to follow that the only proper person to decide whether there should be a waiver of attorney-client privilege respecting transactions that took place prior to bankruptcy is the bankrupt corporation itself, by its authorized officer or officers.



client confidences. The absence of litigation, until quite recently, over trustee "waivers", as well as the inherent disincentives against bankruptcy, suggest that this is a spurious concern.

But if the Government's position were the law, then a substantial inhibition against seeking the protection of the federal bankruptcy laws would be created. If the bankrupt's privilege(s) pass to a trustee, all prior confidences between the debtor and his or her or its attorney would be insecure and open to disclosure to anyone for any reason or, as here, for no reason at all beyond the solicitation of the government.*

This is not a case which explores the boundaries of the attorney-client privilege, or the scope of a recognized exception to the privilege. It is a case where the privilege itself is challenged, and a novel device for circumventing it—arising only upon bankruptcy—is sought to be estab-

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* The Government points out the supervisory powers of United States Trustees (over private trustees, such as Mr. Notz in this case) and their statutory designation as bankruptcy trustees when a private trustee is not available. (Petition for Writ of Certiorari, at 17, n27.) What the Government does not point out is that U.S. Trustees are themselves part of the government: they are appointed by (and subject to removal by) the Attorney General (28 U.S.C. 581(a), (c)). The trustees that the Government would allow to waive private debtors' attorney-client confidences are subordinates of the nation's chief law enforcement officer. In effect, the Government seeks judicial approval for government waivers of private parties' privileges to itself. Predictably, under this arrangement, what occurred in this case would be the norm rather than a "considered" exception: trustees would hardly ever refuse an investigatory effort to inquire into prior attorney-client confidences. Indeed, the Government concedes this to be the practice now: "voluntary cooperation of trustees with . . . government . . . investigations of prior management—including . . . waiver of the attorney-client privilege—is common." (Petition for Writ of Certiorari, at 16.)

lished. The proffered mechanism is "waiver" and the artifice of transferring the privilege to a bankruptcy trustee. The net effect, of course, is to eliminate the rights of the privileged party, and to make available to the Government privileged information which, but for bankruptcy, would be secure.

The transfer-waiver device asserted by the CFTC should not be judicially engrafted onto the Bankruptcy Code. Only Congress should direct such a consequence of bankruptcy, and it clearly has not done so.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

September, 1984

Respectfully submitted,

DAVID A. EPSTEIN
*Attorney for Respondents,*
*Frank H. McGhee*
*and Andrew McGhee*

JANN, CARROLL, SAIN & DOLIN, LTD.
55 East Monroe Street, Suite 4444
Chicago, Illinois 60603
(312) 236-3600



## APPENDIX A

*(Letterhead of)*
Chicago Discount Commodity Brokers, Inc.
175 West Jackson Blvd.
Chicago, Illinois 60604
(312) 922-5888

March 11, 1982

Constantine J. Gekas, Esq.
4600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

Re: *Chicago Discount Commodity Brokers, Inc.*

Dear Mr. Gekas:

I have received your letter dated March 5, 1982 with respect to the attorney/client privilege held by the above-named debtor. As Interim Trustee for this debtor I hereby waive any interest I have in the attorney/client privilege possessed by that debtor for any communications or information occurring or arising on or before October 27, 1980. This waiver specifically does not apply to the relationship between me and my attorneys of Gardner, Carton & Douglas.

Very truly yours,
/s/ John K. Notz, Jr.
Interim Trustee

JKN/do
cc: David F. Heroy